IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 583

PHILIP B. FLEMING, Temporary Controls Administrator, *Petitioner*

v.

MOHAWK WRECKING and LUMBER COMPANY, a Partnership, and Harry Smith

BRIEF FOR RESPONDENT

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OPINION BELOW

In this case the Opinion of the District Court (R. 11) is reported at 65 Fed. Supp. 164, and that of the Circuit Court of Appeals for the Sixth Circuit (R. 17) at 156 F. (2d) 891.

JURISDICTION

Appellee does not question the jurisdiction of this court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, but of course, as indicated by its motion separately briefed is questioning the right of Philip B. Fleming, Temporary Controls Administrator, to occupy the position of appellant in this case.

SUMMARY OF ARGUMENT

Decision of the question presented in this case is controlled by the former decision of the Supreme Court in *Cudahy Packing Company v. Holland*, 315 U. S. 357, and the rule announced therein requires affirmance of the judgment of the Circuit Court of Appeals, Sixth Circuit in the case at bar.

The decision of the Supreme Court in the *Cudahy case* was not based upon the legislative history of the Fair Labor Standards Act, but upon the primary reason that the Congressional purpose in this type of legislation is "that the subpoena power shall be delegable only when an authority to delegate is expressly granted", and comment upon legislative history in the opinion in the *Cudahy case* is present only *arguendo* as a supporting reason for the ruling of the court.

All arguments about legislative history, statutory setting, and Administrative Construction, while permissible at times in resolving ambiguities, have no application here since no ambiguities exist and there is no language in the Emergency Price Control Act, as amended, related to administrative subpoenas, distinguishing it from the Fair Labor Standards Act and permitting any difference in construction.

ARGUMENT

Respondent and appellee in the case at bar contends that decision of the sole question before this court is entirely controlled by the former decision of this court in *Cudahy Packing Company v. Holland*, 315 U. S., 357. In deciding this *Cudahy case*, this court, of necessity, gave extended consideration to the Congressional Legislation commonly known as The Fair Labor Standards Act (Title 29, U.S.C.A., Section 201, et seq.), and The Federal Trade Commission Act (Title 15, U.S.C.A., Section 41, et seq.). Admittedly, there are no significant differences in language between the applicable sections of the Fair Labor Standards Act and of the Emergency Price Control Act.

We feel that since the language in this legislation is so alike, a judicial construction of one of the Acts by our Supreme Court must be controlling of interpretation of another of the Acts. Hence, in reliance upon the opinion of the Supreme Court of the United States in *Cudahy Packing Company v. Holland*, supra, we submit that, even though that case arose out of a question of interpretation of the language of the Fair Labor Standards Act, with the language in the Emergency Price Control Act of 1942, as amended, so like that in the Fair Labor Standards Act, the decision on the question of power to delegate authority to sign and issue Administrative subpoenas must be the same.

> "All this is persuasive of a Congressional purpose that the subpoena shall be delegable only

when an authority to delegate is expressly granted" (Page 366).

Cudahy v. Holland, supra.

"All this" refers to more than appellant cares to admit. In appellant's argument he would have you believe that the words "all this" refer only to the court's consideration of the legislative history of the one Act, i.e. The Fair Labor Standards Act. Appellant would have you believe that the Supreme Court was pronouncing a rule only applicable to and deduced from consideration of that one Act. Hence, says appellant, since the legislative history of that one Act discloses that Congress expressly considered and expressly rejected a suggestion for delegation of subpoena power, the power of delegation cannot be read into that one Act. However, says appellant, since Congress in considering The Emergency Price Control Act, as amended, did not consider and did not reject (expressly) the delegation of subpoena power, therefore you must read into a general grant of power to the Administration the right to delegate the subpoena power.

But this argument is fallacious because of the words "all this" as used in the opinion of the Supreme Court refers to much more legislation than the Fair Labor Standards Act, and refers to most, if not all, of the legislation enacted by Congress prior to the date of the opinion which included provisions for Administrative subpoena procedure. The court said:

> "The entire history of the legislation controlling the use of subpoenas by Administrative Officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power" (Page 364).

This statement in the opinion was followed by enumeration of four other Acts of Congress which contained provisions for the use of Administrative subpoenas. The opinion then concludes that for all legislation of this type the judgment of the court is that the power to delegate authority to issue subpoenas must be "expressly granted" or it *does not exist*. "Shall be delegable only" cannot be read to mean "except in the case of the Emergency Price Control Act." "Expressly granted" cannot be read to mean that the words of some Senator or group of Senators must limit that full force of this restriction.

The idea that the Supreme Court was adjudicating a positive general rule and not one limited to one Act of Congress is further established by the language of the following sentence, "that purpose has been emphasized here." In other words, the positive general rule that the power must be "expressly granted" is "emphasized" by its particular application to the one Act of Congress. But the court's decision is not limited in application to that one Act of Congress or its legislative history. In all Congressional legislation of this type we must find the authority to delegate "expressly granted" or it is not there. It is not "expressly granted" in the Emergency Price Control Act, and hence, it is not there.

The Supreme Court in the language of the opinion of the majority in the *Cudahy case* was saying to all lower courts, to Congress, to the Members of the Bar of the Nation, and to the public, that in the case of any Act of Congress, language like that found in the Fair Labor Standards Act must be construed in

denial of the power to delegate authority to sign and issue subpoenas.

As an indication that a fundamental rule generally applicable (i.e. that subpoena power not delegable unless expressly granted), was the real purport and consequence of the decision in the *Cudahy case*, and an indication that the decision in this case was not limited merely to an interpretation of legislative history, Justice Douglas in his dissent disposed of the legislative history argument with just three sentences, to-wit:

> "The legislative history of this Act does not stand in the way. There is no indication whatsoever that the choice of the House bill as against the Senate bill was in any way influenced by the presence in the latter of an express power of the proposed Board to delegate its subpoena power. The controversy centered on the question as to where administration of the Act should be lodged" (Page 371-372).

The principle burden then of the dissenting opinion, which is sufficiently long to fill six pages of the published reports, is that as a fundamental rule of law the power to delegate must be implied. This principle the majority of the court rejected and, in doing so, adjudicated the opposite principle which must be applied universally "that the subpoena power shall be delegable only when an authority to delegate is expressly granted." We are bound by this rule of the majority of the court. Since there is no express grant of that authority in the Emergency Price Control Act, the authority must be denied to the Administrator by implication.

It is enough to conclude this discussion by borrowing a paragraph from the opinion of the court below (R. 20):

> "The Administrator's contention in the present case that the foregoing rule is not applicable because his authority to delegate the subpoena power is expressly conferred by the provisions of the Emergency Price Control Act set out hereinabove is directly contrary to the ruling of the Supreme Court in the *Cudahy case* that such provisions, practically identical in wording, did not expressly delegate such authority to the Administrator. Accordingly, unless the rule announced in the *Cudahy case* is to be set aside or modified, or unless distinguishing features in this case make it inapplicable, the Price Administrator lacked the claimed authority to delegate the subpoena power to the district director who issued the subpoena herein involved."

However, the labored attempt by petitioner and appellant to contend in his brief that there are distinguishing features in the Emergency Price Control Act which make the rule announced in the *Cudahy case* inapplicable, requires some comment by way of rebuttal. We content ourselves with approaching this discussion under the same headings and in the same order in which they are presented in appellant's brief.

1. Section 201(A) and (B) and Its Legislative History.

Respondent and appellee contend first that legislative history need not be considered at all in the light of the rule of law primarily controlling that in the absence of an express grant of the power of delegation it does not exist. Secondly, however, we also contend that even if the entire legislative history be considered it does not lead to the conclusion advanced by petitioner.

Passing on then, for a moment, to Senate Report No. 931, 77th Congress, 2d Session, to which reference is also made in appellant's brief, we note in that report the following items which appear to indicate an approach somewhat different from that which appellant claims for the one isolated quotation set out in his brief.

Page 6:

> "The Committee also considered the alternative of substituting a board of several members for a single Administrator. However, almost every qualified witness who testified before the Senate and House Committees *urged centralization of ultimate authority and responsibility in a single individual*" (Italics supplied).

Page 7:

> "This shortened hearing procedure, *which has already been developed by other Federal Administrative agencies*, is entirely consistent with the preservation of individual rights, and is essential to the administration of an emergency price control statute" (Italics supplied).

Page 8:

> "The Committee, of course, recognizes that competent administration and enforcement of the Act will be impossible unless the Administrator and persons acting under his direction are given broad investigatory powers. To this end the bill, *like most recent* legislation, provides authority for obtaining any information, oral or written, which may be of assistance to the Administrator in carrying out his duties" (Italics supplied).

Page 21:

> "Section 202(a) (922(a), Title 50, U.S.C.A.) authorizes the Administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced *through the usual forms of compulsory process* and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations" (Italics supplied).

The appellant in quoting in his brief the two sentences from page 20, and the one sentence from page 21 of the same report, apparently argues in substance that the Senate Committee on Banking and Currency was thereby reporting to the Senate an opinion of the Committee that this then new bill, the Emergency Price Control Act, would encourage, favor and authorize (1) decentralization of enforcement and (2) possession of an investigative power peculiar to this bureau and more broad in authority than was and is enjoyed by the Fair Labor Standards Administrator and other Federal Administrative

agencies. Quite contrary to such argument, it appears to us that an examination of the entire context of this report, including the quotations from pages 6, 7, 8 and 21, discloses a congressional purpose and intent that one person would and should have responsibility as well as authority and that, as far as investigative procedure is concerned nothing was being established which was not "already developed by other Federal Administrative agencies," "like most recent legislation," and "the usual forms of compulsory process."

Our conclusion then is that the so-called legislative history of which appellant makes so much does not disclose a congressional purpose and intent to have the Office of Price Administration looked upon by the courts from any perspective different from the other Administrative agencies; does not disclose any ambiguity or uncertainty in the language of the legislation; and does not disclose any consistency, regularity or seeking after confirmation in the matter of reporting to the Congress regarding the policy of the use of Administrative subpoena or other compulsory process.

At the time Congress extended the Emergency Price Control Act of 1942 by passing the Stabilization Extension Act of 1944, approved June 30, 1944, and again in 1945 by Joint Resolution approved June 30, 1945, the Supreme Court Decision in *Cudahy v. Holland* was a matter of public record and the extension of the legislative language must be presumed to have been done in the light of the Supreme Court interpretation of that legislative language. Furthermore, in passing the Stabilization Act of 1944, and

in adopting the Joint Resolution of June 30, 1945, Congress incorporated, presumably after consideration, several Amendments to the Emergency Price Control Act of 1942. We feel that it must be said that Congress, though deeming it wise to amend some sections of the original Act, having every opportunity to amend other sections of the original Act, and having in mind that the Supreme Court had announced its interpretation of language identical with Sections 922(b), U.S.C.A. 50, App., by apparently deeming it unnecessary to amend this Section here in question, publicly announced acceptance by the Congress of the Supreme Court's limitation upon delegation of Administrative Subpoena Power.

2. The Broad Scope and Emergency Character of the Administrator's Responsibilities.

We believe that complete answer to the argument of petitioner and appellee under this heading is stated concisely and completely in the following language of the opinion of the court below (R. 24):

> "If such authority is necessary to make the administration and enforcement of the Act successful, Congress can at any time and in short order create such authority. The appellant's contention in this respect is sufficiently answered by the following closing words in the majority opinion in the *Cudahy case:*
>
> > 'Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to

restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction.'"

3. The Corroborative Inferences to Be Drawn From Other Features of the Act.

Again we believe that complete answer to this argument is stated by the court below (R. 23) more cogently than we could phrase it. Hence, we borrow that court's language as follows:

> "It is then contended that if certain functions and duties are delegable under the Act, and no differentiation is made by the Act between different functions and duties, it necessarily follows that all of his functions and duties, including the power to issue subpoenas, are delegable. The answer to that is that the Supreme Court in the *Cudahy case* had before it the same language and the same question and held that the statutory authority to delegate 'his functions and duties under the Act did not include the authority to delegate the subpoena power."

We presume, however, to supplement this reasoning of the court below with some additional comment. Appellant offers subdivision (d), Section 201, U.S.C.A., War Appendix, as one of the sections of the Emergency Price Control Act, wherein may be found power in the Administrator to delegate authority to subpoena. While the language of this

subdivision (d) is not found in the same identical words in the Fair Labor Standards Act, most of its purport is found in subdivision (f) of Section 208 (U.S.C.A. Title 29), in the following language:

> "Orders issued under this section * * * shall contain such terms and conditions as The Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof and to safeguard the minimum wage rates established therein."

However, the language of said subdivision (d) in the Emergency Price Control Act does not aid appellants contention because so far as it is cited as measuring the power of the Administrator to delegate authority to subordinates, it means no more than other language found in the earlier subdivisions (a) and (b) of the same section 201 of the Emergency Price Control Act. Subdivision (a) reads in part: "The Administrator may * * * appoint such employees as he deems necessary in order to carry out his functions and duties under this Act etc." Subdivision (b) reads in part: "he or his duly authorized representatives may exercise any or all of his powers in any place." It cannot be said that as far as delegation of power is concerned, the Administrator can do, by regulation or order (subdivision (d)), more than he can do by appointment of an employee (subdivision (a)), or by conferring due authority upon a representative (subdivision (b)). The precise language of Subdivisions (a) and (b) is also part of the Fair Labor Standards Act and was before the Supreme Court in the *Cudahy case* wherein the Supreme Court said the power to delegate must be "expressly granted" and held in

effect that such power was not "expressly granted" by such language as is found in Subdivisions (a) and (b).

4. The Administrative Practice of Delegation, and Its Ratification By Congress.

Respondent and appellee believes this argument to be irrelevant, to be founded upon a false premise and to be completely unsupported in fact.

It is irrelevant because in amending the Emergency Price Control Act for the purpose (among others) of extending the time of its life on June 30, 1944, and on June 30, 1945, Congress then definitely had before it the decision of the Supreme Court in the *Cudahy case,* and with the Supreme Court of the land interpreting identical language, of what moment or weight would be an administrative construction.

It is founded upon a false premise and unsupported in fact because, as pointed out by the court below (R. 22) "the Act was not Administratively construed from the outset to permit such delegation." While it does appear that among the documents in the files of the Office of Price Administration is a memorandum opinion dated March 26, 1942, issued by the Assistant General Counsel for the Administrator, construing the Act to permit the delegation here contended for, it also is uncontradicted that this remained only the private thinking of certain officials in this Agency and that, as far as public procedure was concerned, there was a period of two years, approximately, during which doubt regarding the

authority to delegate the subpoena power caused the Administrator to refrain from its exercise. Again we quote from the opinion of the court below (R. 22):

> "Apparently, the Administrator finally took the position on May 13, 1944, when he assumed to exercise that authority, that he would attempt to obtain favorable action upon his contention by litigation rather than by Congressional action, in spite of the obvious delay and expense involved in the litigation that was certain to follow. Such administrative construction of the Act have very little, if any, weight."

But since petitioner and appellant has presented to this court on Pages 20, 21 and 22 of its brief, three paragraphs extracted from the testimony of Mr. Fleming James, Jr., and apparently has attempted to contend that these three paragraphs accurately "summarized" the history of the Administrative Construction of this question, we have felt that the court ought to consider the entire substance and context of Mr. James' testimony and of the questions asked of him and of the Congressional comment made upon the occasion of the Hearing to which reference is made. (Special Committee of the House to Investigate Executive Agencies on June 22, 1944). Accordingly, we have appended to this brief as an Appendix the complete transcript of Mr. James' testimony at that hearing as it related to the discussion of the question at bar. We believe that a better and more accurate statement to make by way of description of Mr. James' testimony before this Committee of Congress would be to say that on the one, single occasion when any branch of Congress had before it in any form the specific question of delegating the subpoena power, the member or members of Congress

to whom the question was presented, rather than approve this claimed Administrative Construction, criticized the Office of Price Administration for adopting, only shortly prior to the date of this hearing, a practice and procedure contrary to the rule announced in the *Cudahy case*, and said, in substance, to the Office of Price Administration, that if the Administrator wished to have the power to delegate his subpoena authority, he had better come to the Congress and ask for it.

We feel obliged to make one further comment relative to the argument of petitioner under this sub-title. On Page 27 of petitioner's brief appears the following language:

> "The Congressional Amendments of 1944 included a specific amendment of Section 202 in two particulars only."

We do not wish the court to gather the impression that the items here mentioned in petitioner's brief were the only items about which Congress amended the Emergency Price Control Act during the year 1944. As a matter of fact, we note that in the "Second Deficiency Appropriation Act, 1944," approved June 28, 1944, there is contained the following proviso, to-wit:

> "*Provided further*, That any employee of the Office of Price Administration is authorized and empowered, when designated for the purpose by the head of the agency, to administer or to take from any person an oath, affirmation, or affidavit when such instrument is required in connection with the performance of the functions or activities of said Office."

This proviso is also presented on page 363 of "Title 50, Appendix, Emergency and Post-War Legislation," U.S.C.A., and there identified as §922a. Hence, it is not to be confused with §922(a) found on page 360 of the last named volume.

Prior to the inclusion of this proviso in the Second Deficiency Appropriation Act, the Authority of Office of Price Administration was found in §922(b) reading in part—"The Administrator may administer oaths and affirmations, etc." Thus it would appear that as of June 28, 1944, Congressional opinion, intent and purpose was that special express language was necessary to give to the Administrator power to delegate his authority to "administer oaths and affirmations." Yet, the legislation which Congress was amending was the same sentence in the Emergency Price Control Act of 1942 upon which the Administrator must depend for his subpoena power. And Congress did not then say that the Administrator might designate an employee who would thereby be authorized and empowered to sign and issue subpoenas. The failure of Congress to include the power to delegate subpoena authority in this express power to delegate authority to administer oaths, is both, an affirmative withholding of delegable subpoena authority in 1944, and an expression in 1944 that since 1942, in line with the *Cudahy v. Holland*, supra, decision, the Administrator has not had the power to delegate his subpoena authority.

As appears to the respondent if there ever was a case in which the rule of *stare decisis* should control the decision, this is it. Respondent contends that if the decision in the *Cudahy case* does not compel

affirmance of the judgment of the court below in this case, then indeed must we abandon all we have learned of the rule of *stare decisis* and henceforth approach each problem presented in private offices and in trial courts without benefit of precedent and as a contest of ingenuity and genius in the formation of arguments which attempt to prove that words as used do not have their usual, ordinary meaning.

CONCLUSION

For the reason stated, respondent in this Case No. 583, contends that the judgment of the Circuit Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

BROWN, FENLON
and BABCOCK.

By: John W. Babcock.
Attorneys for Respondent.

February, 1947.

APPENDIX

TESTIMONY OF FLEMING JAMES, JR., Director of the Litigation Division, Office of Price Administration

Before

House of Representatives Special Committee To Investigate Executive Agencies June 22, 1944

Present: Representatives Smith (Chairman) and Hartley. Aaron L. Ford, General Counsel to the Committee, and Joseph H. Stratton, Assistant Counsel to the Committee.

Mr. Ford: Will you explain briefly to the committee your legal authority for issuing this regulation?

Mr. James: Yes.

May I, before I begin that, convey Mr. Fields apology for not being here. He has just been asked by Mr. Wagner to help prepare something else.

The Chairman: That is all right.

Mr. James: Our legal authority is this: The language of the Emergency Price Control Act in section 201 (b) contains this language:

> that the principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place.

Now, that language was adopted before the *Cudahy decision*. That language is just the same as the language in the Fair Labor Standards Act which was one of the things that was dealt with in the *Cudahy decision*. It is our belief, and our legal opinion, that the language was found by the court in that case to be ambiguous and was resolved against the power of

delegation because of the specific legal legislative history, and because of companion provisions in that act.

In that case, for instance, or rather in the Fair Labor Standards Act, for instance, there is a specific authority to delegate the investigating power to subordinates.

There was also in the legislative history, a specific provision allowing the Administrator to delegate the subpena power, but that was stricken out by both Houses before the bill was passed and became an act.

In addition to that is the fact that it incorporated by reference the subpena powers of the Federal Trade Commission Act, which did not allow delegation and had been so construed.

Now in the light of all those things, the Supreme Court held that this language in that particular act did not authorize a delegation. On the contrary in our act there is a different legislative history. There is no incorporation by reference of any provisions of any other administrative statutes, and there are no comparable companion provisions in the act itself.

If there is not an authority to delegate in the Price Control Act, then there is no authority in the act for any of the functions of the Administrator. There is nothing in the Price Control Act that corresponds to that specific delegation in the Fair Labor Standards Act of the authority to investigate.

Further, in the legislative history, we have the Senate Committee making this statement, the Senate Banking and Currency Committee. In connection with this particular language involved in this act, which was before the *Cudahy decision*, the Senate committee said:

> The Administrator may perform his duties by such employees or agents by delegating to them any of the powers given to him by the bill.

It goes on to say in section 210(b) that the "principal office of the Administrator shall be in the District of Columbia," but authorizes the Administrator or any representative or other agency to whom he

may delegate any or all of his powers to exercise such powers in any place.

Mr. Ford: May I interrupt, Mr. James?

Mr. James: Yes.

Mr. Ford: In view of the legislative history of the act which you quote, and the Supreme Court decision, will you please tell the committee why you persist in delegating the power, the subpena power, of the Administrator?

Mr. James: Because we felt that under our legislative history, it is authorized by that language in our act.

Mr. Ford: I know, but even the Supreme Court puts the exact language contained in the Emergency Price Control Act in the Fair Labor Standards Act which it decided upon.

Mr. James: That is true.

Mr. Ford: Do you still insist the Supreme Court is wrong?

Mr. James: No; certainly not. Our belief is that the two cases are distinguishable, notwithstanding the fact that the language is the same. The distinction is in this: In that case, the Supreme Court construed that language, feeling it was doubtful in the light of legislative history, and companion provisions of that act to reach one result; inasmuch as the legislative history and the companion provisions in our act are almost, you might say, the reverse of what there was in the Fair Labor Standards Act, we felt that that same language, with that same doubt would be construed by the Court the other way.

The Chairman: The net result is that you are obtaining delegating powers, not through the act itself but through your construction of the legislative history of the act.

Mr. James: Well, I suppose that an act really doesn't stand apart from all of the canons of construction that may be gone into.

The Chairman: Is it your construction of the law that you can use the legislative history to determine proper application of an act when there is no question about the language, when the language is clear?

Mr. James: No, Your Honor; it is not.

The language was sufficiently doubtful in the Fair Labor Standards Act, the same language, for the court in that case to lean heavily on the legislative history and use that as an aid to construction there.

The Chairman: Don't you think you are skating on pretty thin ice?

Mr. James: Your Honor—I am sorry. How do I address you, by the way. I am used to a court.

The Chairman: That is very immaterial.

Mr. James: I want to do it right. Mr. Smith, we think that that is a perfectly tenable legal conclusion, one that we can prevail on. Otherwise, there is no authority to delegate any of the powers under the Price Control Act, and from the very beginning the position was taken that a great many of those powers must necessarily be delegated and they have been delegated, as, for instance, in community prices which were adopted fairly early, where the regional administrator partakes of the very essence of price-fixing power itself.

The Chairman: Is it the result of your conclusion in regard to the subpena power that you would also have the right to delegate any other power you wanted to delegate under the act?

Mr. James: I should think that the Administrator could have the power to delegate any of his powers.

The Chairman: By construction?

Mr. James: Yes; by construction of that language.

The Chairman: Not by the language itself.

Mr. James: Well, I cannot view language itself as apart from the construction we feel the courts would put on it.

Mr. Hartley: They are agencies of the Government.

The Chairman: Now, what you are aiming to do is to pursue this thing far enough to get a different construction from the Court?

Mr. James: We feel a different construction will be given to it by the Court.

(Whereupon a short recess was taken, after which the meeting was resumed, with Representa-

tive Hartley acting as chairman in Mr. Smith's absence.)

Mr. Ford: Now, Mr. Hartley, if you have some questions in mind, you might ask them, and then I will ask some questions.

Mr. Hartley: I would prefer you to go ahead, because I am at a disadvantage in this whole business, not being an attorney.

Mr. Ford: Mr. James, in order that the record may disclose your exact position with the Office of Price Administration, would you briefly relate that?

Mr. James: I am Director of the Litigation Division of the Enforcement Department of the Office of Price Administration.

Mr. Ford: Then are you authorized to speak for Mr. Emerson, and Mr. Field, Mr. Emerson being enforcement attorney and Mr. Field being general counsel?

Mr. James: I think so, so far as this matter is concerned. Yes, I think so. It is a legal proposition.

Mr. Ford: Then, in the issuance of General Order No. 53, did you prepare that or did someone under you prepare that?

Mr. James: Someone under me prepared that.

* * * * *

Mr. Ford: Now, coming directly to the point in question, in the issuance of General Order No. 53, did you review the action of the man in preparing that draft?

Mr. James: Yes.

Mr. Ford: Do you review all of the orders which are prepared?

Mr. James: No; I only review the ones that are prepared by the Litigation Division.

Mr. Ford: What was the purpose of the promulgation of that order?

Mr. James: It was a matter of administrative convenience, and putting the responsibility where we felt it could best be performed by the people who really had the facts and really knew the situation; that is, the regional administrators and district directors.

Mr. Ford: Now, did you personally have knowledge of the fact—and I assume you did—of the decision of the *Cudahy Packing Company v. Holland*?

Mr. James: Yes; I did.

Mr. Ford: When this order was prepared?

Mr. James: Yes; I did.

Mr. Ford: And approved by you?

Mr. James: Yes.

Mr. Ford: And you sent it to the Administrator with the knowledge of that decision?

Mr. James: Yes.

Mr. Ford: Now, did somebody else in the Department down there suggest that this order be prepared?

Mr. James: The thing had been talked about for a long time. The position had been taken long before I came there that it would be permissible, that it would be legally permissible. There had been a great deal of discussion about it all along.

Mr. Ford: Who had talked about it generally beside yourself?

Mr. James: Well, I had talked about it, Mr. McChesney and Harry Jones, and all of the other Division directors from time to time, and with Nathaniel Nathanson.

Mr. Ford: Who is he?

Mr. James: Nathaniel Nathanson is an associate general counsel, and he is in charge of the court review and opinions.

Mr. Ford: And you are in charge now of what?

Mr. James: The litigation. His branch has to do with the protests and the Emergency Court of Appeals litigation, and ours has to do with the general litigation in the district courts and State courts, and circuit courts of appeal.

Mr. Stratton: Yours is merely enforcement work and his is appellate work on the protest side.

Mr. James: He is not enforcement at all. We are enforcement.

Mr. Ford: Now, is Mr. Emerson your superior, so to speak?

Mr. James: Yes, I report directly to Mr. Emerson.

Mr. Ford: And he is associate counsel?

Mr. James: He is a Deputy Administrator now. He was associate counsel.

Mr. Ford: In other words, he is one of the high officials of the Office of Price Administration?

Mr. James: He reports directly to Mr. Bowles.

Mr. Ford: And he was acting general counsel at one time?

Mr. James: At one time he was.

* * * * *

Mr. Ford: Did Mr. Emerson tell you at that time that he anticipated the Supreme Court would reverse itself in the event you put such a regulation in effect?

Mr. James: We didn't think it was a case of the Supreme Court reversing itself. We had always thought since the very beginning, that the Supreme Court would probably decide in our favor on our statute because of the differences I have explained to you.

Mr. Ford: You mean from a Government standpoint?

Mr. James: No because of the difference in the legislative history and the companion provisions of the act.

Mr. Ford: You have been practicing law long enough to know that the Supreme Court does not take into consideration the legislative history of an act unless it is ambiguous, haven't you?

Mr. James: That is right.

Mr. Ford: Well, how can you reconcile the legislative history? Did you rely upon the legislative history for the construction?

Mr. James: Yes; because the Supreme Court relied upon legislative history for the construction of the *Cudahy case.*

Mr. Ford: So it did. How do you believe that the legislative history of the Price Control Act will enable the Supreme Court to arrive at a different conclusion, unless they want to reverse their decision?

Mr. James: In the legislative history of the Fair Labor Standards Act, there had been—

Mr. Ford: I am not talking about the legislative history of the Fair Labor Standards Act. But if you want to use that for an explanation, you may do so.

You are perfectly at will to explain as you wish, but I am talking about the legislative history of the Emergency Price Control Act, disregarding the legislative history of the Fair Labor Standards Act. Can you do that and answer my question?

Mr. James: I think so, although our opinion is based on a comparison or rather a contrast between the two legislative histories. The specific thing that was most persuasive, or among the most persuasive things to me in the specific legislative history of the Price Control Act, is the paragraph from the Senate committee report, the Senate Banking and Currency Committee, that says:

> The Administrator may perform the duties through such employees or agencies by delegating to them any of the powers given to him by the bill.

That explains the language concerned.

Mr. Ford: You rely upon that explanation as the construction of the law?

Mr. James: We rely upon that in part.

As I say, our position is based on a contrast between the entire legislative history, and the companion provisions of the two acts, the one that gave rise to the construction of the *Cudahy case*, and the one we feel would require a different construction of the language here.

Mr. Ford: Now, to be real frank and honest, which I know you will be, isn't it the desire of the Office of Price Administration to have another test of this very language?

Mr. James: That certainly is not a main consideration at all. We feel that this is legally justified, and we feel that this is a way that eliminates the delays and the roundaboutness of the old system, and puts the real responsibility in the hands of the people who really would have to make the decision anyway, and the people who know most about it, and that that way will be both legal and generally fair.

Now we are perfectly willing to have a court test, but we aren't seeking a court test, and are not going out of our way for it.

Mr. Ford: Doesn't the regulation sort of put you in the way for it?

Mr. James: It is not designed with that in mind. We do not avoid it, but the thing that we are trying to get is not a court test. I mean this very sincerely. What we seek is not litigation, but a fair and expeditious and legal way of doing a very important thing.

Mr. Ford: Have you ever spoken to the Congress about the legal way to do things?

Mr. James: I haven't; no, sir.

Mr. Ford: Have you suggested to the Administrator, Mr. Emerson, or to Mr. Bowles, or whoever is in charge down there, about the legal way to do things?

Mr. James: You mean about this particular thing?

Mr. Ford: Well, yes. Hasn't that been a serious question in the minds of everybody down in the O.P.A.?

Mr. James: It was not, frankly, a thing that I considered one way or the other. I felt that the present language was adequate.

Mr. Hartley: Mr. Ford, I would like to interject a question at this point.

We have just finished a consideration of the Price Control Act extension. Hearings were held before the Banking and Currency Committee. Don't you think you would have been on much more solid ground and would have had far greater legal authority had you come before the Banking and Currency Committee and suggested that this being necessary, you would like to have had it written into the extension of price control?

Mr. James: I think this is true, sir: That there would be no doubt at all if Congress specifically gave that delegation as a result of that.

Mr. Hartley: Why wasn't that done? To me that is the important issue involved in this regulation. My opinion is, and I am just passing it on for whatever it may be worth, that there is an obvious attempt being made to just bypass the Congress and to legislate these regulations and orders, when, in my opinion, it

would be on much better ground if you came to Congress and asked for the authority.

Now, you had a friendly Banking and Currency Committee, and I would like to know why you didn't come to them and ask them for this authority if it was so necessary and so important to you.

Mr. James: Well, it never occurred to me, frankly. I had felt that from the very first time that I went down there, we had discussed the problem, and we had felt that the authority was there, and it was simply a case of exercising the authority that we felt the act had given us.

Mr. Hartley: You admit, of course, you are likely to be subjected to a challenge on it, don't you?

Mr. James: Yes.

Mr. Hartley: You would be if you had come to Congress and gotten that authority, would you?

Mr. James: I should think not.

Mr. Hartley: Then, will you please tell me why you didn't do that?

Mr. James: Well, so far as I personally am concerned, it just didn't occur to me.

Mr. Hartley: That is just the point that I am getting at. It doesn't seem to occur to you folks in the O.P.A. to come to Congress when you need some authority for your decisions and your acts. You just go ahead and write a regulation. In other words, you write the law.

Mr. James: We are certainly always subject to what the courts decide, sir, and we felt the law gave it to us as it was.

Mr. Hartley: But in the interest of strong and firm price control, you would still be on firmer ground if you had obtained the authority from Congress. You admit that, and I still cannot understand why you did not come to Congress to get it.

Mr. James: We certainly do on a great many things.

Mr. Hartley: I am more concerned with your having done it by regulation than I am by the practical effect of it. In other words, I think my chief complaint with the O.P.A. is that you just seem to want to be a

law unto yourselves and you want to bypass the Congress, bypass the courts, and everybody if you can get away with it.

Mr. James: We certainly do not bypass the courts, and we do not bypass Congress, as I see it.

Mr. Ford: Why do you say the courts in the first instance?

Mr. James: Because my concern is primarily with the courts. I have had no experience with legislative bodies. My practical experience has all been in court as a litigating lawyer. Inevitably I am used to thinking what is legal or not under the terms of an existing statute and probably court decisions or past court decisions under that statute.

Mr. Ford: Where did you say you practiced before you came here?

Mr. James: Connecticut.

Mr. Ford: I am "Citizen A" in Connecticut. You have got a sign hanging up over your door, "Fleming James, Esq." Evidently you are prepared to take care of my problem. I come into your office and I say that a subpena has been issued against me by such and such blank name, regional attorney or director, whoever you delegated in General Order No. 53. What can I do about it? I don't want to produce my books. It will cost me $3,000 to haul these things into the Federal courtroom. What would you advise me, in view of the decision in the *Cudahy case*, the exact language appearing now in the statute that you are operating under, and the Fair Labor Standards Act that the court decided in that particular case. What would you tell me?

Mr. James: If I gave him an honest opinion, I would tell him I felt that this case was different because of the differences that underly it.

Mr. Ford: And that I must haul my books in?

Mr. James: I should think that he would have to.

Mr. Ford: I see. I believe that is all, Mr. Chairman.

Mr. Stratton: Mr. James, you said, but I didn't wholly recollect, when you first came to O.P.A.

Mr. James: I think the exact date was October 19, 1942.

Mr. Stratton: You knew of the existence of this memorandum dated March 26, 1942, from Nathaniel L. Nathanson, addressed to David Ginsburg, Thomas Emerson, and others, the one you brought this morning?

Mr. James: Yes, I have seen it in the course of time.

Mr. Stratton: Did you ever discuss with the other attorneys down there the impasse which had been reached as a result of the *Cudahy case*, the doubtfulness of the power to delegate the subpena?

Mr. James: Yes; we have had several discussions of the legal question.

Mr. Stratton: Did you know that there had been suggested that the Administrator sign hundreds of subpenas in blank and then send them out over the country to his field officers, who would fill them in and use them?

Mr. James: I first learned of that from you this morning, Mr. Stratton.

Mr. Stratton: I will read you this memorandum which you brought up, and I will offer this in evidence later, and see that you get a copy of it:

> The majority opinion in the *Cudahy case* was careful to point out in the issue there decided that it was the authority of the Administrator to delegate the power both to sign and issue a subpena. In footnote 10, the court alluded to the practice of signing subpenas in blank and delegating the power to issue already signed subpenas, and said, "We are not concerned here with the validity of such a practice, since both the signing and issuance of the subpenas is delegated by the Administrator."
>
> I feel very certain that if a case should arise where the administrator of the Office of Price Administration had signed subpenas in blank and permitted the regional director to issue them, the vote in the court would be shifted and the Cudahy opinion distinguished on this ground.

Now, wasn't there serious consideration of having the Administrator sign subpenas in blank and forward them to his regional directors?

Mr. James: That was the practice.

Mr. Stratton: And that practice was instituted in order to circumvent the ruling of the *Cudahy case*, was it not?

Mr. James: That is not a question of circumvention.

Mr. Stratton: Perhaps that was an unfortunate word, but I mean in order to avoid having a subpena declared invalid.

Mr. James: That was the practice that was adopted, because it was felt that that would propose no legal questions whatever.

Mr. Stratton: Doesn't that tend to show that the attorneys in charge of the Office of Price Administration had serious doubts as to the legality of delegating the subpena power to regional directors?

Mr. James: It would be idle for me to say it is a question that is free from legal doubt. Surely the question has some legal doubt.

Mr. Stratton: I mean aren't there doubts in your mind and the minds of other high officials in the O.P.A. as to the legality of this General Order 53?

Mr. James: Yes; I do not think it is a sure-fire proposition.

Mr. Ford: Doesn't that go back to Mr. Hartley's question as to why, without the sure-fire proposition, you do not come to Congress and make certain proposals for the clarification of the situation?

Mr. James: The situation, as it appeared to me at that time was this: The subpenas were being issued in blank, signed by the Administrator, as is the practice in the district courts and in a great many of the administrative bodies. That was a burden. Furthermore, it didn't put the responsibility of signing on the person who ought to be the responsible person to make the decision.

I felt that all that was being changed was a matter of form and that there was actually a guaranty of

greater rights, more real consideration to the persons who would be subjected to subpenas.

In view of that, I did not regard what we did as being a momentus step at all. I must say that it seemed to me one that involved some legal doubts, but where I felt we were legally right and that we ought to do it that way.

Mr. Hartley: Now, on the other hand, it is pretty well understood that the O.P.A. had hoped that the Congress would extend the Price Control Act in a simple resolution without any changes at all, and it wasn't until it became obvious that there were going to be changes that there was any sign of willingness to have these changes made.

Now, was it because of that attitude that no one came to Congress to ask for this change?

Mr. James: I think that the real answer is that I never suggested it because it never occurred to me. So far as I know, it had no relationship to that at all, and I am giving you a very candid answer.

Mr. Hartley: Now, let me ask you this: In the light of this string of views here this morning, do you think it should have some effect on your thinking later on that when you come to one of these questions where there is some doubt that it ought to inspire you to seek relief from the Congress?

Mr. James: Usually that is one of the primary things that we do think of, naturally. Here, as I say, was a change, which, in effect, was really a change in interoffice administration. It wasn't a change that seemed to us to affect substantive rights. I felt, as I say, that it was legally sufficiently clear, so that the other thing did not occur to me. It certainly does usually occur to me.

Mr. Hartley: Has this passage that has been outlined in the court's decision been entered in the record?

Mr. Stratton: No.

Mr. Hartley: I would like to read this and then ask a question. Speaking of the meaning of this act and so forth, the court said:

The construction of the act which would thus

permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the act has in terms given only to him, can hardly be accepted unless plainly required by its words.

I think you agreed that the authority is not in the law or in the language of the law, but rather you gain the authority through the legislative history. Is that correct?

Mr. James: The two are inseparable, as I see it, sir. That is, the language cannot be viewed apart from the legislative history, nor can the legislative history be viewed apart from the language.

Mr. Hartley: But when the language doesn't give you the authority, you go back to the history to get the authority, is that correct?

Mr. James: I cannot say whether or not the language gives you the authority until you view it in the light of legislative history.

Mr. Ford: Mr. James, you are a lawyer. Let's come down to the le[illegible]ics that we were taught back in grade [illegible]ow do you arrive at a consideration of the legislative history of the act when it is not ambiguous?

Mr. James: When it is not ambiguous, you don't.

Mr. Ford: What are you doing it for then? It is not ambiguous.

Mr. James: I think it is, and the Supreme Court considered the legislative history and interpreted it in the light of the legislative history.

Mr. Hartley: All right. Let's take another case, and I am going to make a statement of fact as I understand it, and then ask your opinion. And I am speaking of the legislative history of the Wage and Hour Act.

When that measure was before the Congress it was stated definitely by the chairman of the Labor Committee of the House, and others, in support of the legislation that it did not apply, for example, to employees of a department store within a community, and it did not apply to a carpenter or a plumber and all those.

Later on we found that the Wage-Hour Administration applied it to persons such as I have mentioned and the court sustained them. Would you say in the light of the facts that I have given you that the Administrator in the case and the courts were wrong?

Mr. James: No.

Mr. Hartley: Well, the legislative history was absolutely contrary and there is nothing in the law. As a matter of fact, there is an exemption in the Wages and Hours Act to those engaged strictly in intrastate business.

Mr. James: Yes; but as I recall it at the time the court's decision and the Administrator's decision was based on the fact that the work of the people you described was related to interstate commerce so directly as to be a part of it. That is my recollection. I am not sure of my ground.

Mr. Hartley: And of course that was contrary to the legislative history. Every person who spoke on the bill said, "No, these people are exempt."

Mr. James: Yes; the legislative history does not always control, as you suggest. But here was a decision that was on a very narrow ground. It was by an almost evenly divided court. It was a decision in which legislative history was leaned on heavily, the history of the Fair Labor Standards Act, and it was my opinon and the opinion of a great many people that our case was different under those circumstances, because the different legislative history would bring a different result. It is a matter of legal judgment.

Mr. Hartley: Let me ask you this: When this order was promulgated, I issued a statement saying that I was going to ask this committee to look into the question. Did you issue the reply that came from the O.P.A.?

Mr. James: I prepared a reply. I don't know whether that was the one that was issued or not, because I thought that none was issued.

Mr. Hartley: Well, there was a statement. As a matter of fact, in the same New York Times story that had an exclusive, the O.P.A. was quoted as say-

ing, "We are not concerned about any investigation. We are absolutely sure of our position." And you admit yourself this morning that there is some doubt.

Mr. James: Oh, yes. I never have taken the position that it was entirely free from doubt.

Mr. Hartley: There is one other point.

Mr. James: I did not make that statement. I wasn't here, by the way. I wasn't in the office when that statement of yours came out. I was out in the field—I forget where—and I came back the day after.

Mr. Hartley: Just how broad is this authority? Will you state for the record exactly what authority this is to these local administrators all over the United States? How far-reaching is that authority? What can they do under it?

Mr. James: They can do just what the Administrator did before. That is, the facts must be laid before them as to why a subpena is sought and the terms of the subpena are laid before them and they determine whether in their discretion a subpena should issue, and if they determine that it should, they sign and issue it.

Mr. Hartley: And how broad would the subpena be?

Mr. James: The subpena has to be specific. That is the requirement.

Mr. Hartley: What may it include?

Mr. James: Well, it may include papers, books, and invoices, relating to certain specific transactions between certain specific dates. Well, it is hard to answer the questions in the abstract.

Mr. Hartley: Well, of course, as I said before, I am at a disadvantage discussing this because I am not a lawyer, but what could it compel a person to bring into the O.P.A.—books and records of all kinds, and what else?

Mr. James: So far as compelling him to produce is concerned, it would be limited to documents. It might also compel a man to come and testify.

Mr. Hartley: And could it also compel a person who might be involved indirectly—for example, an agent for a piece of property?

Mr. James: Yes.

Mr. Hartley: And all his records?

Mr. James: It couldn't be so broad as to cover all his records. It would have to describe them specifically.

Mr. Hartley: Suppose it described them as the complete records, for example, on all other pieces of property for which he happened to be agent, even though the owners of those properties were not involved in this particular case?

Mr. James: Well, there is very often no case pending when one of these subpenas is issued. The subpena may issue primarily for two reasons: One would be to investigate conditions in connection with promulgating a price or rent regulation to get background information to know what is a proper and fair regulation, and the other would be an investigation by the Enforcement Division

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Mr. Stratton: Mr. James, I would like to refer you again to this memorandum of Nathaniel Nathanson. He says:

> I feel very certain that if a case should arise where the administrator has signed subpenas in blank and permitted the regional director to issue them, the vote in the court would be shifted and the Cudahy opinion distinguished.

Now, while he feels very certain that he would be on sound ground if that were done, and that, as a matter of fact, was done for a couple of years, evidently he felt very uncertain that if the Administrator had simply delegated the subpena power that such delegation would stand up in court.

As a result of that evident feeling of uncertainty, the Office of Price Administration for 2 whole years followed the practice of signing the subpenas in blank so as to be on safe ground.

Now, what has happened in recent months to cause the Office of Price Administration to change their policy? Has there been a decision of the Supreme Court which you felt modified the ruling of the Cudahy decision?

Mr. James: No; we never have changed our policy or our thinking. Mr. Nathanson has always felt that the delegation was proper. I know that from talking to him.

Now, there has been no important thing that has caused this change. It was a change that I did not regard as important. It was a change of simply making the form correspond to the substance, as it has been described already. All the Administrator did was to sign the subpenas in blank and the actual responsibility for issuance was in the same people to whom the authority to sign is now delegated.

I felt that all that was involved here was a matter of putting the responsibility for signing where it really belonged, in the people who had the real responsibility for issuance.

Mr. Stratton: I don't think anybody will argue with you about the practicality of delegating that responsibility to the party issuing the subpena, but Mr. Nathanson said he felt certain that the signing of subpenas in blank and issuing them out to the issuing party was O.K. He didn't say he felt certain that delegating the entire subpena power was legal. When did the opinion in the Office of Price Administration change so that you arrived at the conclusion that the delegation of the subpena was a legal delegation?

Mr. James: So far as I know, it has never changed. That is, it is still today that which is there described as a legal certainty, and this is on a plane of somewhat greater doubt.

Mr. Stratton: Now, wasn't it patent at the time this memorandum was issued and the policy inaugurated of signing subpenas in blank that it would be more practical to delegate the responsibility of signing subpenas? Isn't it pretty obvious that that is the better practice?

Mr. James: The practice as of now?

Mr. Stratton: Yes.

Mr. James: Yes, I would think so; and, as you suggest, it was felt that the somewhat greater legal doubt inhibited it.

Now, the only change that has taken place in the meantime has been the gradual increasing of the burden on the Administrator.

Mr. Stratton: Since there is no argument as to the greater practicality of delegating the subpena power, it seems there was sufficient legal doubt at the time this memorandum was issued to cause the Office of Price Administration to avoid an attempt to delegate the subpena power. I am interested to find out when that doubt was removed, and how.

Mr. James: Well, it is not, as I have said right along, entirely free from legal doubt now. But with the increasing administrative burden and the fact that the opinion had always been that it was legally justifiable, the decision finally got made and it was made, by the way, earlier than the time it came out.

Harold Craske was just delayed in getting the order drawn up.

Mr. Ford: Where is he from, incidentally?

Mr. James: New York City.

Mr. Stratton: The only way to have finally resolved that doubt would have been to have received specific authorization for the delegation of that power.

Mr. James: A court decision would resolve it.

Mr. Stratton: And if you had received from the Congress a specific authorization, you would have avoided the possibility of litigation. It would be very expensive to the Government and even more expensive to the private individual who would be burdened with taking the case through the various steps up to the Supreme Court.

Mr. James: If they had given it to us, but certainly this is true. You never can tell what will happen if you put the thing directly up to Congress, I suppose. As I say, it wasn't considered by me, but so far as the wisdom of a course of action is concerned, a situation may very well arise where you have language that you feel legally supports what you are doing and which was intended that way at the time when it was enacted, and that you feel you might get an entirely different result at a later time when the temper of things is changed.

Mr. Ford: What do you mean "temper of things"?

Mr. James: If the attitude of Congress toward the agency changed, or something like that. That isn't a thing considered in this case.

Mr. Ford: What you really mean is the temper of the courts, don't you?

Mr. James: No; I didn't mean that, sir.

Mr. Ford: You didn't?

Mr. James: No.

Mr. Ford: I didn't exactly understand what you meant.

Mr. James: What I meant was simply that if you asked for a clarifying amendment later, you might not get it even though Congress would have originally enacted it at the time it was passed.

Mr. Ford: Isn't it the purpose of the O.P.A. to try to get in litigation this very question in order to get the court to reverse itself?

Mr. James: No.

Mr Ford: Have you discussed that?

Mr. James: Yes.

Mr. Ford: And you thought the court would reverse itself?

Mr. James: We didn't feel it would be a case of reversal. We thought we would get a different decision in this case than in the *CUDAHY PACKING COMPANY case.*

Mr. Ford: Don't you know as a lawyer that this case is right in the face of the *Cudahy Packing case*?

Mr. James: No, I don't sir.

Mr. Ford: I beg your pardon for pressing you that far.

Mr. Hartley: Mr. James, is there any question in your mind as to how Congress would have acted had you made the request during the just past consideration of the extension of price control?

Mr. James: I really just don't know, sir.

Mr. Hartley: Let me ask you this: Have you followed the history of the legislation we have just passed?

Mr. James: A good deal of it, sir.

Mr. Hartley: Don't you know that as a matter of

fact, the so-called court review provisions in the present bill were written by the O.P.A.? Don't you know that Mr. Field helped write that?

Mr. James: Well, he certainly was consulted in it, I do know that, but it wasn't written by us.

Mr. Hartley: Well, it was in all practical effects, if the word of the members of the Banking and Currency Committee can be accepted, because I was told definitely by one of the members of the committee that Mr. Field collaborated in the writing of that court review provision.

Mr. James: Well, of course, your knowledge is infinitely greater than mine is on that.

Mr. Hartley: I am telling you that a member of the Banking and Currency Committee, who was a member of the conference, told me that, and what I am getting at is you had a very friendly Banking and Currency Committee that in my opinion would have accepted this beyond any question of doubt.

Mr. James: I think probably that is true. Now, what you are suggesting is that I made an error in judgment in not taking one course rather than another. I can certainly see some doubt as to the wisdom of what I have done, in view of all you suggest. All I can say is that this was a thing that we had considered all along under the present language, and had felt to be that way under the present language, that at the time the change came to be made, it was really a ministerial change, a change in form and not in substance, and that I didn't think legislation was necessary, nor did it occur to me to seek it.

Mr. Hartley: Nor did anyone else in the O.P.A. in the Division that should be concerned about it? No one else suggested, "We might go to Congress and ask them to give us this authority." Didn't anybody ever bring that up?

Mr. James: I am sure it must have been brought up. I don't specifically recall the conversations over this, which occurred over a long period of time, and at the time that this change in the procedure came, I don't remember any suggestions. I cannot remem-

ber everything that has been said over the whole period of time I have been there.

Mr. Hartley: I should imagine you might recall whether or not that was ever suggested, whether it would be better to go to Congress and get the relief or just assume the authority.

Mr. James: Well, it is scarcely a case of just assuming the authority, if the authority is already there and it is a question of legal judgment whether it is already there.

Mr. Hartley: I realize that. I want to ask you another question: What part will Mr. Polier have in this, as far as these subpenas are concerned? Will he have any dealing in the issuance of these subpenas, and so forth?

Mr. James: No; the issuance of the subpenas is delegated only to the district directors and I should say first the regional administrators and the district directors. They are the ones who are vested with the discretion to sign and issue and he is not one of those.

Mr. Hartley: Well, I will ask you specifically: Will Mr. Polier have the authority to run all over the country issuing subpenas?

Mr. James: He cannot sign and issue a subpena under this.

Mr. Hartley: He could not?

Mr. James: No; he is not given authority to do that, nor anyone else in his position.

Mr. Hartley: In your interpretation of the law, do you see anthing in the law that might later on give him that authority? Do you think the Administrator under the act has the authority to delegate that to him?

Mr. James: Yes; I think the Administrator has the legal authority to delegate it to him, but this is true: The subpena power has been very carefully preserved in the administrative part of the agency and not given to the enforcement part of the agency. As I say, there has been no essential change. This order works no essential change, and that is why I didn't give it the serious consideration that I perhaps should have as to the various ways of doing it.

There certainly isn't any tradition or any predisposition to grant the subpena power to the enforcement side of the agency, and I know that it won't be done.

Mr. Hartley: But in your interpretation of the act, and if this authority is correct, Mr. Bowles would have the authority to let Mr. Polier issue subpenas?

Mr. James: Yes; he has the authority to make what would be an unwise delegation, to be sure, just as that would be true under the delegation of any of his powers.

Mr. Hartley: I am glad you agree it would be an unwise delegation of authority.

Mr. James: I think it would be unwise only because I think it would be unwise to delegate the subpena power to the Enforcement Department, to me, or to Mr. Emerson. I think it should be in the administrative side.

Mr. Hartley: Have you completely explained the extent to which the subpena power can be used? Are you satisfied that you have?

Mr. James: Well, I think so, unless you have some specific question.

Mr. Hartley: I asked you to explain how broad this authority was in your opinion.

Mr. James: Yes.

Mr. Hartley: And I am asking you whether or not you have explained that for the record.

Mr. James: Well, I think so. The requirement is that a subpena must be specific. It must contain a specific description of what is desired. The way that is usually made specific is that it described documents pertaining to certain named transactions, or with certain named people between certain given dates. That is the practice generally in connection with the subpenas.

Mr. Hartley: Could it force a person to bring in his bankbooks?

Mr. James: Yes; I think so.

Mr. Hartley: His savings accounts?

Mr. James: You mean the records of his savings accounts?

Mr. Hartley: Yes; I mean his bank book which shows how much money he has in the bank and his checking account.

Mr. James: Yes; I think it could.

Now, of course, this subpena like any other subpena, is subject to privilege, and if a man claims privilege, then if he still is compelled to testify, immunity is thereby granted to him from any criminal or penal liability arising out of the transactions about which he testifies. That is a fairly usual procedure.

Mr. Hartley: Could it compel a farmer, for example, to give the O.P.A. information concerning how many chickens he had and how many eggs they laid a day, and what price he was getting for his eggs, and all the details of his farm? I am interested in that. I am a farmer.

Mr. James: Yes; I think it could.

Mr. Hartley: Could it force him to tell, for example, how many jars of jelly his family had preserved for the winter, and all that?

Mr. James: Yes; it could, I think. That certainly might very well be relevant to a rationing inquiry as to sugar allotments. That, by the way, would not be under the Price Act, but under the Second War Powers Act, where the powers are very similar.

Mr. Hartley: Of course, they are all interwoven.

Mr. James: Yes; but I just wanted to explain that.

Mr. Stratton: Mr. Chairman, I think it would probably be wise to insert in the record the exact provisions of the Price Control Act which defines and delegates the subpena power. Section 202(c) reads:

> For the purpose of obtaining any information under subsection (a), the Administrator may, by subpena, require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

Subsection (a) reads:

> The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to

assist him in enforcing any regulation or order under this act, or in the administration and enforcement of this act and regulations or orders and price schedules thereunder.

At Mr. James' suggestion, I will also read subsection (d) of section 202:

> The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy) or has entered into a stipulation with the Administration as to the information contained in such document.

I would like the record to show that an exhibit was offered, consisting of a memorandum from Mr. Nathaniel L. Nathanson, dated March 26, 1942, this being the memorandum from which the quotations have been made.

(the document referred to was marked "Exhibit No. 581.")

Mr. Ford: Mr. Chairman, do you want to adjourn?

Mr. Hartley: The meeting will be adjourned subject to the call of the chairman.

(Whereupon, at 12 o'clock noon, the hearing was adjourned.)